## **United States Government**



## NATIONAL LABOR RELATIONS BOARD Region 29 Two MetroTech Center--Suite 5100 Brooklyn, New York 11201-3838

August 8, 2012

Lester A. Heltzer, Esq. Executive Secretary National Labor Relations Board 1099 14th Street, N.W. Washington, DC 20570-0001

Re: Atlantic Veal & Lamb, Inc. Case Nos. 29-CA-024484, et al.

## Dear Secretary Heltzer:

Please accept this letter as Counsel for the Acting General Counsel's opposition to Respondent's Request for Reconsideration of the Board's June 27, 2012 Second Supplemental Decision and Order. For the reasons set forth below, Counsel for the Acting General Counsel urges that the Board deny Respondent's Motion.

On June 27, 2012, the National Labor Relations Board issued a Second Supplemental Decision and Order in the above-referenced case, (358 NLRB No. 74) in which it found that Respondent had failed to meet its burden of showing that the discriminatee in this matter had additional interim earnings in 2002, 2003 and the first two quarters of 2004 that he failed to report to the Board. In making this finding, the Board opined that there was no doubt that the discriminatee lied to someone about his earnings. In this regard, evidence at the hearing showed that a mortgage application filed on the discriminatee's behalf indicated that he had substantially more earnings in 2002 and 2003 that he reported to the Board or than those reported in his income tax returns filed with the Internal Revenue Service. However, the Board concluded that Respondent had failed to meet its burden to establish that the discriminatee lied to the Board because the evidence produced by Respondent created no more than an unresolved doubt about whether the discriminatee had concealed earnings from the Board and doubt alone would not suffice to satisfy Respondent's burden. On July 25, 2012, Respondent filed a Motion for Reconsideration with the Board.

In its Motion, Respondent argues that the Board should reconsider its underlying decision, and deny, in total, an award of backpay to the discriminatee. In support of this argument Respondent asserts that in the Board's underlying decision (342 NLRB 418 (2004)), the finding that Respondent committed an unfair labor practice by discharging the discriminatee was based on crediting the discriminatee's testimony over that of Respondent's owner. Respondent contends that given what is now known about the discriminatee's proclivity to lie, it is doubtful that anyone would find him a credible witness. Respondent further contends that the Board should reconsider its decision that the discriminatee was unlawfully terminated and thereby obviating the need to award him backpay. Respondent's Motion is clearly baseless and should be denied.

Although Respondent's Motion is titled a "Motion to Reconsider the Board's Second Supplemental Decision and Order," the Motion seeks to have the Board reconsider its June 30, 2004 decision in this matter (342 NLRB 418). However, the Board's underlying Decision and Order has been enforced by a Judgment issued on October 27, 2005 by the United States District Court for the District of Columbia Circuit in Case No. No. 04-1326. Thus, the question of whether Respondent committed an unfair labor practice is *res judicata*, and cannot be collaterally attacked by way of a motion to reconsider the second supplemental decision.

Even if the Board were to consider Respondent's Motion for Reconsideration, it should be denied on the merits. The Board's Rules and Regulations at Section 102.48(d)(1) provides that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page in the record relied on." Respondent's motion fails to meet the Board's criteria for granting reconsideration and therefore should be denied. Respondent has neither argued nor shown that the Board made a material error with respect to a finding of a material fact in its June 27, 2012 Second Supplemental Decision.

For the above reasons, Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's Motion for Reconsideration.

Respectfully submitted,

Kathy Drew King

Counsel for the Acting General Counsel

National Labor Relations Board

Region 29

cc: Steven B. Chesler, Esq, Leila M. Maldonado, Esq.